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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROSALINDA ENRIQUEZ,

Plaintiff and Appellant,

v.

AMERIFIRST MORTGAGE
CORPORATION,

Defendant and Respondent.

G039465

(Super. Ct. No. 04CC06074)

O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County,
H. Warren Siegel, Judge. Judgment and order reversed, with directions.

Law Offices of Sally L. Gersten and Sally L. Gersten for Plaintiff and
Appellant.

Philip W. Green for Defendant and Respondent.

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Plaintiff Rosalinda Enriquez approached defendant Amerifirst Mortgage Corporation (Amerifirst) to remove her brother from the mortgage they held together on plaintiff's home. Although Amerifirst should have advised her simply to pay her existing lender a fee for removing his name from the existing mortgage, Amerifirst instead refinanced plaintiff's home into a new mortgage and home equity line of credit (HELOC). Incorrectly expecting that Amerifirst would use the HELOC proceeds to pay off the outstanding balance on her car loan, plaintiff sought information from Amerifirst and the lender about the allocation of the HELOC proceeds. Receiving no response, plaintiff eventually stopped making payments on the HELOC, hoping this would prompt the lender to answer her questions. The lender foreclosed on plaintiff's home, and hired defendant Fidelity National Agency Sales and Posting (Fidelity) to conduct the auction. The lender was willing to let plaintiff redeem the property up to the time of the sale, but when plaintiff presented the redemption money to the Fidelity auctioneer at the time set for the sale, the auctioneer informed her the property had been sold five minutes earlier.

Plaintiff sued Amerifirst for breach of contract and breach of fiduciary duty for failing to inform her she could remove her brother's name from title without incurring the expense of refinancing and for failing to answer her questions regarding the use of the HELOC proceeds. Plaintiff sued Fidelity for negligence for holding the foreclosure auction before the scheduled time. Plaintiff settled with Fidelity for \$10,000 before conclusion of trial. The jury awarded plaintiff \$9,837 on her breach of fiduciary duty claim against Amerifirst, but rejected her breach of contract claim. The trial court determined Amerifirst and Fidelity were joint tortfeasors, and offset the jury's award with the prior settlement, resulting in a net zero recovery for plaintiff. Accordingly, the court entered judgment for Amerifirst, and granted Amerifirst attorney fees based on a provision in the HELOC trust deed.

Plaintiff contends the trial court erred in failing to resolve an apparent conflict between the jury's finding Amerifirst breached its fiduciary duty to plaintiff and

its finding Amerifirst did not breach the contract. Plaintiff also contends the trial court erred in offsetting the Fidelity settlement against the jury's award, and awarding Amerifirst attorney fees.

We reject plaintiff's contention the jury's findings are inconsistent. The breach of a fiduciary duty which arises from a contract may, but does not always, constitute a breach of that contract. Accordingly, the jury's finding in plaintiff's favor on the breach of fiduciary duty claim is not inconsistent with their finding in favor of Amerifirst on the breach of contract claim.

Nonetheless, we conclude the trial court erred in its determination that Amerifirst and Fidelity were joint tortfeasors. The jury's award reflected the amount of loan fees Amerifirst charged plaintiff for refinancing her home. Fidelity did not participate in that transaction, becoming involved only with the foreclosure sale years later. Accordingly, we reverse the judgment in Amerifirst's favor, and instruct the trial court to enter a new judgment in plaintiff's favor reflecting the jury's award. Because we reverse the judgment, we also reverse the order granting Amerifirst attorney fees as the prevailing party.

I

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff owned a home with her brother subject to a mortgage with Washington Mutual (WAMU). Because plaintiff's brother purchased another home, he asked plaintiff to take him off title and leave the mortgage in plaintiff's name only. Plaintiff contacted Amerifirst by telephone, and provided information allowing Amerifirst to complete a preliminary application to refinance his property. The completed application included a notation explaining the purpose of the new loan was to "take brother off title, give sister fixed rate." Amerifirst was a licensed mortgage broker for several companies including WAMU. Plaintiff's WAMU loan was assumable, and

plaintiff could have removed her brother from the loan for a \$900 fee without obtaining a new loan. Amerifirst, however, never informed plaintiff about this option.

Shortly after her telephone call, plaintiff visited Amerifirst's office. The Amerifirst representative completed an evaluation worksheet based on plaintiff's answers to certain questions. The completed worksheet correctly reflected plaintiff's monthly income as \$3,100. At the same meeting, plaintiff filled in part of a residential loan application, but an Amerifirst employee completed the application. Although plaintiff had stated her income was \$3,100, either the Amerifirst representative or an unknown person wrote that she earned a monthly income of \$4,600.¹ Amerifirst sent the completed forms to its loan processing department.

After submitting the application, an Amerifirst representative informed plaintiff she did not qualify for a single loan, and would need a first mortgage and a HELOC. An Amerifirst representative told plaintiff she would have to pay off part of her existing car loan with the HELOC, and plaintiff gave the representative a copy of her car payment book. Amerifirst submitted an application for the HELOC that was not in plaintiff's handwriting, and an unknown person signed on plaintiff's behalf.

On January 14, 2000, plaintiff again visited Amerifirst and signed papers for two loans funded by Greenpoint Mortgage Funding (Greenpoint), one secured by a first trust deed in the principal amount of \$144,000, and a HELOC secured by a second trust deed in the principal amount of \$15,500. One of the papers signed was an equity loan disbursement schedule showing a payment of \$14,885 to Informed Escrow. Plaintiff mistakenly believed some of the HELOC proceeds would go towards her car loan, with the remainder used for closing costs.

¹ At trial, plaintiff denied she wrote the \$4,600 figure on the application. During cross-examination, Amerifirst read plaintiff's deposition testimony, where she admitted the \$4,600 entry "looks like my writing." On redirect, plaintiff explained the handwriting looked like hers, except for the figure "4."

Escrow closed on January 20, 2000. For the next several months, plaintiff grew concerned when she did not see a reduction of her car loan. On June 2, 2000, plaintiff called Greenpoint to determine how the HELOC loan proceeds were allocated. At Greenpoint's instruction, plaintiff returned to Amerifirst's office and asked them about her car payment. Amerifirst's representative, however, said Amerifirst could not assist her because the company no longer had the loan file.

Plaintiff telephoned Greenpoint repeatedly to inquire about the car payment because Greenpoint serviced the loan, but no one called her back. Plaintiff thought Greenpoint would respond to her if she stopped making payments on the HELOC. At some point, Marin Conveyancing Corporation (Marin) began servicing the HELOC, and in late 2003, Greenpoint and Marin commenced foreclosure proceedings on the second trust deed securing the HELOC, and sent a default notice to plaintiff. Shortly thereafter, Marin sent plaintiff a notice of trustee sale, and hired Fidelity to auction the property. The foreclosure sale was initially set for February 25, 2004, but was continued to March 25, 2004, at 2:00 p.m. On the day of the sale, plaintiff had a third party approach the Fidelity auctioneer at 2:00 p.m., with cashier's checks in the amount necessary to redeem the property. The auctioneer, however, had sold the property five minutes earlier.

Plaintiff's home sold for \$239,050 at the sale, subject to the balance of the first mortgage, \$139,602.24. Greenpoint received \$17,378.03 from the foreclosure sale, and plaintiff received the excess proceeds, \$221,635.97.

On May 21, 2004, plaintiff sued Greenpoint, Marin, and the purchasers of the property at the foreclosure sale. After the purchasers obtained summary judgment, plaintiff amended her complaint to add Fidelity and Amerifirst. After another amendment of the complaint, the trial court granted judgment on the pleadings for Greenpoint and Marin.

Plaintiff's second amended complaint alleged against Amerifirst causes of action for breach of contract and breach of fiduciary duty, based on Amerifirst's failure to

advise plaintiff she could remove her brother's name from the existing mortgage without getting a new loan, and Amerifirst's failure to respond to plaintiff's request for information about the use of the HELOC proceeds. The pleading alleged a cause of action for negligence against Fidelity, based on the auctioneer's sale of the property before 2:00 p.m. on March 25.

On the second day of trial, plaintiff settled with Fidelity for \$10,000. After trial concluded, the jury returned a special verdict finding (1) Amerifirst did not prove plaintiff knew, or reasonably should have known of Amerifirst's alleged wrongful acts or omissions before May 21, 2000; (2) Amerifirst breached a fiduciary duty to plaintiff; (3) Amerifirst's breach of fiduciary duty was a substantial factor in causing harm to plaintiff; (4) plaintiff suffered \$9,837 in economic damages only; (5) Amerifirst did not fail to meet its contractual obligations; and (6) plaintiff failed to mitigate her damages, but this omission should not reduce the damage award.

The trial court denied plaintiff's new trial motion challenging the sufficiency of the damage award. The court offset the \$9,837 jury award against Amerifirst with the \$10,000 Fidelity settlement, and entered judgment in favor of Amerifirst. The trial court awarded Amerifirst prevailing party attorney fees under Civil Code section 1717, based on a fee provision in the trust deed. The court, however, reduced the fees by 50 percent as an apportionment because the jury found in favor of plaintiff on the breach of fiduciary duty claim. The total fee award in favor of Amerifirst was \$61,465. Plaintiff now appeals the judgment and the attorney fee award.

II

DISCUSSION

A. *The Trial Court Erred in Offsetting the Jury's Award with the Fidelity Settlement*

Plaintiff contends the trial court erred in offsetting the jury's damage award with the fidelity settlement because Amerifirst and Fidelity were not joint tortfeasors.

We agree.

Code of Civil Procedure section 877 provides: "Where a release, dismissal with or without prejudice . . . is given in good faith before verdict or judgment to one or more of *a number of tortfeasors claimed to be liable for the same tort* . . . it shall have the following effect: [¶] . . . It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater." Code of Civil Procedure section 877 seeks to ensure that "a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one joint tortfeasor and all of his claim from another." (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 544.) But "[n]othing in the good faith settlement statutes suggests they apply to litigants other than 'joint tortfeasors' (alternatively described as 'tortfeasors claimed to be liable for the same tort')" (*Herrick Corp. v. Canadian Ins. Co.* (1994) 29 Cal.App.4th 753, 759-760.)

It is abundantly clear that plaintiff did not seek to hold Fidelity and Amerifirst liable for the same tort. In her first amended complaint, plaintiff alleged Fidelity, as auctioneer of the property, acted negligently in holding the foreclosure sale earlier than the 2:00 p.m. scheduled time, thus preventing plaintiff from redeeming the property. Plaintiff sought damages against Fidelity for economic loss and emotional distress arising from the loss of her home to foreclosure. Plaintiff did not include Amerifirst in her negligence cause of action against Fidelity.

In contrast, the jury awarded plaintiff exactly \$9,837 in economic losses, the precise figure presented to the jury as the damages representing the loan fees charged plaintiff when she refinanced her house. The jury apparently concluded Amerifirst breached its fiduciary duty when it failed to inform plaintiff she could simply remove her brother's name from the existing mortgage without refinancing and incurring the loan fees. This tort is entirely separate from Fidelity's alleged negligence in holding the foreclosure sale five minutes early.

The present case resembles *Carr v. Cove* (1973) 33 Cal.App.3d 851, 852-853 (*Carr*). There, the plaintiff suffered injuries in an automobile collision. Two months later, she was again injured in a second collision. The plaintiff filed suit against both drivers, and settled her personal injury claim with the driver in the first accident for \$50,000. Trial proceeded against the second driver, and the jury awarded the plaintiff \$35,000. The trial court rejected the second driver's request to offset the jury's award with the earlier settlement.

The appellate court in *Carr* affirmed, noting Code of Civil Procedure section 877 "works to prevent settlements from producing double recoveries in the case of a *single* injury caused by joint tortfeasors. The general theory of compensatory damages bars double recovery for *the same wrong*. The principal situation is where joint or concurrent tortfeasors are jointly and severally liable for *the same wrong*." (*Carr*, *supra*, 33 Cal.App.3d at p. 854, original italics.) The court determined that "[o]rdinarily, no danger of a double recovery exists where separate tortfeasors cause separate injuries." (*Ibid.*) Because Fidelity and Amerifirst were not joint tortfeasors, the trial court erred in offsetting the jury's award with the Fidelity settlement. Accordingly, we reverse the judgment in Amerifirst's favor and direct the trial court to enter a new judgment in plaintiff's favor reflecting the jury's award.

B. *The Jury Did Not Make Inconsistent Findings*

Plaintiff contends we must reverse the judgment because the jury rendered inconsistent verdicts by finding Amerifirst breached its fiduciary duty, but did not breach the contract. We disagree.

Plaintiff asserts that each breach of a fiduciary duty founded in contract is “‘deemed’ a breach of contract as a matter of law.” In support, plaintiff cites *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921-923; *UMET Trust v. Santa Monica Medical Investment Co.* (1983) 140 Cal.App.3d 864; and *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1323 (*EFund Capital*). These cases do not support plaintiff’s assertion. At best, *Lee* supports the proposition that a fiduciary duty may arise from contract, and that a breach of the fiduciary duty “may often . . . constitute a breach of contract as well.” (*Lee*, at p. 922.)

Plaintiff relies in particular on *EFund Capital, supra*, in which the court enforced an arbitration clause in a contract because the plaintiff’s tort claims, including breach of fiduciary duty, arose from the agreement. But *EFund Capital* did not hold that a breach of fiduciary duty constitutes a breach of the agreement. *EFund Capital* cited with approval *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1315, in which the court determined that an arbitration clause in a condominium purchase agreement covering disputes arising “in connection with” the agreement was broad enough to cover tort claims, including breach of fiduciary duty. If each breach of a fiduciary duty arising from a contract as a matter of law also constituted a breach of that contract, the *Izzi* court’s analysis of the scope of the arbitration clause would have been unnecessary.

Plaintiff fails to cite any cases requiring a new trial where a jury finds the breach of a fiduciary duty arising from a contractual relationship, but fails to find a breach of contract. We are aware of none doing so. Accordingly, we do not disturb the jury’s verdict on this basis.

C. *Plaintiff Is Not Entitled to a New Trial or Additur*

Upon a motion for new trial where the damages are inadequate, the court in its discretion may issue an order granting the motion for new trial unless the defendant consents to an additur as determined by the court. (*Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 832; Code Civ. Proc., § 662.5, subd. (a).) Plaintiff does not contend the trial court abused its discretion, but requests that if we hold the breach of fiduciary duty finding equates to a breach of contract finding as a matter of law, we should grant additur to include the additional contract damages. Plaintiff, however, does not state what these damages are, or why they would not already be subsumed in the damages the jury awarded. Accordingly, we deny plaintiff's additur request.

D. *The Trial Court Did Not Err in Granting Nonsuit on Plaintiff's Punitive Damage Claims*

1. Evidence of Punitive Damages

At the close of plaintiff's case, the trial court excluded evidence of punitive damages because plaintiff had not submitted sufficient evidence Amerifirst had engaged in intentional misconduct. We construe the trial court's order as a grant of nonsuit on the issue of punitive damages. Plaintiff contends the trial court erred in making its order. We disagree.

A nonsuit on the issue of punitive damages is proper when no reasonable jury could make the findings required by Civil Code section 3294. (See *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 60-61.) Civil Code section 3294, subdivision (b), provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious

disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.” In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, our Supreme Court interpreted the statutory term ““managing agent”” to mean “those employees who exercise substantial discretion in their decisionmaking so that their decisions ultimately determine corporate policy. [Citation.]” (*Id.* at p. 566.) The court found that the mere ability to hire and fire employees does not make a supervisory employee a managing agent. As with the requirement of fraud, malice, or oppression, the findings required under subdivision (b) of Civil Code section 3294 must be supported by clear and convincing evidence. (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644.)

Here, plaintiff contends she submitted sufficient evidence supporting punitive damages, citing a mortgage application form reflecting an inflated income figure for plaintiff and a HELOC application in which her signature appears to have been forged. But no evidence demonstrates that an officer, director, or managing agent of Amerifirst performed or ratified the forgery of plaintiff’s name on the mortgage application, or inflated her income on the HELOC application. Specifically, no evidence demonstrated who at Amerifirst’s office filled out and signed the HELOC application on plaintiff’s behalf. Evidence did suggest one of Amerifirst’s employees, Barbara Uhlman, wrote the inflated income amount on a loan application. But the evidence concerning Barbara Uhlman’s position with Amerifirst showed only she was an employee in the processing department. This is manifestly insufficient to support the findings required by Civil Code section 3294, subdivision (b). Accordingly, we conclude the trial court did not err in precluding punitive damages.

2. Postforeclosure Appreciation Damages

Plaintiff contends the trial court erred by excluding evidence pertaining to loss of appreciation on the house from the time of the foreclosure sale until the time of

trial. Plaintiff contends these damages would have been available if the trial court had allowed her to proceed under a theory of intentional breach of fiduciary duty or constructive fraud. Because the trial court determined the evidence at most demonstrated a negligent breach of fiduciary duty, it excluded appreciation damages evidence.

Regardless of whether the trial court was correct in its determination that the evidence did not support an inference of an intentional breach, a threshold question arises whether plaintiff may recover damages from Amerifirst arising from the foreclosure of her home. As plaintiff notes in her brief, “there obviously were *two separate breach or at fault dates*: (1) Amerifirst’s 2000 breach resulting in \$9,837.00 in awarded damages and (2) Fidelity’s separate 2004 breach for neglect as the auctioneer [in selling the property too soon].” Thus, plaintiff does not assert Amerifirst did anything to cause foreclosure on the second trust deed, other than to provide the HELOC to her without first explaining she could have removed her brother from her existing loan for a fee, and failing to provide adequate information regarding use of the loan proceeds.

“Detriment is a loss or harm suffered in person or property.” (Civ. Code, § 3282.) “For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment *proximately caused* thereby, whether it could have been anticipated or not.” (Civ. Code, § 3333 , italics added.) “‘Proximate cause involves *two* elements.’ [Citation.] ‘One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event.’ [Citation.]” (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045 (*Ferguson*)). Here, Amerifirst’s failure to provide adequate information to plaintiff induced her to obtain the HELOC. Because foreclosure of the HELOC could not have occurred without Amerifirst providing plaintiff the HELOC, Amerifirst’s failure to disclose the alternative option of removing her brother from the existing loan established the necessary antecedent fact causing plaintiff to lose her home.

“By contrast, the second element focuses on public policy considerations. Because the purported causes of an event may be traced back to the dawn of humanity, the law has imposed additional ‘limitations on liability other than simple causality.’ [Citation.] ‘These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy.’ [Citation.] Thus, ‘proximate cause “is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor’s responsibility for the consequences of his conduct.”’ [Citation.]” (*Ferguson, supra*, 30 Cal.4th at p. 1045.)

In the present case, any connection between Amerifirst’s failure to provide plaintiff information regarding refinancing and the foreclosure is too attenuated to allow recovery for lost appreciation between the time of foreclosure and trial. Amerifirst is not responsible for Fidelity’s alleged early sale of the home, and should not be responsible for plaintiff’s failure to make payments on the HELOC. In short, Amerifirst’s failures did not justify plaintiff’s course of action. Plaintiff understandably grew frustrated when the lender failed to respond to her requests for basic information. But plaintiff’s decision to stop paying her HELOC was ill-advised, and resulted in a predictable outcome. We therefore conclude, as a matter of public policy, that a borrower may not simply cease paying a secured loan because the lender made inadequate disclosures, and then recover damages for the foreclosure. To hold otherwise would create an incentive for the borrower to seek foreclosure, an unwarranted development considering the current crises in the housing market.

E. *The Trial Court Did Not Commit Instructional Error*

1. Constructive Fraud

“A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct

in specific terms that relate the party's theory to the particular case.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) Plaintiff contends the trial court erred by not providing jury instructions on constructive fraud.

In her brief, Plaintiff contends constructive fraud “instructions were requested, but refused.” Plaintiff, however, fails to provide any record cite demonstrating that she requested instructions covering this issue. Even if we ignore this lapse, however, plaintiff fails to demonstrate prejudice from the trial court's failure to give a constructive fraud instruction. As we discuss above, plaintiff sought to use a constructive fraud theory to obtain postforeclosure appreciation damages. Because we conclude these damages would have been unavailable under the facts plaintiff alleges, any error by the trial court in denying a constructive fraud instruction is harmless.

2. Breach of Fiduciary Duty

The trial court instructed the jury on breach of fiduciary duty, including CACI Nos. 4100, 4101, and 4102. Plaintiff asserts the trial court should have given additional special instructions relating to the duties a fiduciary owes, and the manner in which those duties may be breached. But the jury found in plaintiff's favor on liability for breach of fiduciary duty. Because none of the requested instructions addressed damages, plaintiff has not demonstrated how she was harmed by the trial court's failure to give the requested instructions.

3. Speculation

The trial court provided jury instructions on speculation, which read in part: “[Plaintiff] does not have to prove the exact amount of damages You must not speculate or guess in awarding damages.” Plaintiff contends an additional instruction should have been given based on the case of *Pollack v. Lytle* (1981) 120 Cal.App.3d 931, as follows: “Once a plaintiff suing for breach of fiduciary duty establishes the cause and existence of damages, difficulty of ascertainment does not bar an award.”

We conclude the instruction the trial court gave adequately informed the jury that it could award damages even though calculating precise damages proved difficult. Consequently, the additional instruction was unnecessary. Moreover, plaintiff has failed to explain how the failure to give the instruction harmed her. Specifically, plaintiff does not describe the damages the jury might have awarded had the instruction been given, or cite any argument by Amerifirst to the jury that the requested damages were too speculative.

F. *The Trial Court Did Not Deprive Plaintiff of a Fair Trial*

1. Voir Dire Questioning

Plaintiff contends the trial court deprived her of a fair trial when it refused to allow her counsel to ask questions relating to bias. We disagree.

Code of Civil Procedure, section 222.5 provides, in relevant part:

“[C]ounsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. . . . [¶] *The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge’s sound discretion.* In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case.” (Italics added.)

The voir dire questioning at issue began with the following colloquy:

“MR. YOUNG: The question that I have for you to begin is with the first part of that and

that is the fact that my client, Ms. Enriquez, is Hispanic. [¶] There's been a lot of publicity about Minuteman and immigration and everything else over the last two years. How many of you can say that you have absolutely no opinion on the immigration issue or ethnicity in Orange County? [¶] THE COURT: Well, you've got two questions. First of all, immigration is not at all involved in this case. If you have a question about ethnicity, go ahead. [¶] MR. YOUNG: Anybody that has no opinion on those issues? [¶] THE COURT: Ethnicity, ladies and gentlemen. Immigration is not at all involved. [¶] MR. YOUNG: Your honor, my question relates to both of them. I would like to have my questions answered. [¶] THE COURT: Mr. Young, immigration is not at issue in this case. [¶] MR. YOUNG: I understand, but it is — [¶] THE COURT: Mr. Young.”

We perceive no abuse of discretion in disallowing Amerifirst's counsel from asking questions about immigration. Nothing in the record demonstrates plaintiff was an immigrant, or that the case would touch upon immigration issues. Accordingly, the trial court's prohibition on this line of questioning falls within the “reasonable limits” allowed under Code of Civil Procedure 222.5.

After the foregoing colloquy, plaintiff's counsel continued: “MR. YOUNG: Anybody have any question about the fact that one of the people involved in this case is of a Hispanic background? Anybody feel that would in some way affect your decision in this case? [¶] THE COURT: And I also have to tell you, ladies and gentlemen, that's true for everybody. If we have an individual against a corporation, under the law of California, everybody is entitled to the same justice. [¶] It doesn't make any difference whether you're an individual, a partner in a corporation. We've got to judge evidence by the same rules. Everybody understand that? [¶] Mr. Young, continue.”

In the foregoing exchange it is unclear whether the trial court made its statement to the jury after they have had an opportunity to raise their hands in response to

the question posed by plaintiff's counsel, or whether the trial court cut plaintiff's counsel off, preventing them from answering. The record does not reflect the time passing between the question asked by plaintiff's counsel and the court's statement.

“A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, original italics.) Because the record does not demonstrate the trial court prevented the jury from answering the question posed by plaintiff's counsel regarding bias against Hispanics, we presume the trial court allowed the jury sufficient time to answer the question.

The next exchange noted by plaintiff includes the following:

“MR. YOUNG: How many of you feel like that people who are minorities have exactly the same opportunity in this country as white Americans? [¶] THE COURT: Mr. Young, please stick to the issues. [¶] MR. YOUNG: Is there anyone who feels that way? [¶] THE COURT: Move on. [¶] MR. YOUNG: How do we assure that a person of color gets a fair trial with all of the publicity that we have had in the news lately concerning one side or the other of these issues relating to ethnicity? [¶] Mr. Reyatt, you aren't Hispanic, I presume? You are of Indian — [¶] MR. REYATT: Yes, sir. [¶] MR. YOUNG: What is the country like? Does it treat you fairly? [¶] MR. REYATT: Yes, it does. [¶] MR. YOUNG: What can we do in this courtroom to make sure that people of color can receive a fair trial? [¶] THE COURT: Mr. Young, I'm going to insist that you move on. They all indicated that they would not consider — that they would be fair an[d] open minded. [¶] And it's not the jury's function to come out with proposals on how to improve the system. It's their function to listen to the evidence and make a fair decision in this case. [¶] Move on. [¶] MR. YOUNG: That's what I'm asking, your honor. I'm not asking them to change the system. [¶] THE COURT: Move on.”

Although the better practice is to permit liberal inquiry on the issue of ethnic bias, we conclude the trial court did not abuse its discretion. The court correctly noted the central issue is not what steps a juror would recommend to eliminate bias in the courtroom, but whether the juror could render an impartial judgment. Simply put, counsel's overly broad and unfocused inquiry prompted the court's intervention, and the court's admonition to the jury that it must render an impartial decision demonstrates the court did not act arbitrarily. We hasten to add, however, a court will abuse its discretion if it refuses to allow a specific and focused inquiry targeted to uncover juror bias.

Even assuming error, plaintiff cannot show prejudice on the record. As the court observed, the jurors all stated they would deliberate fairly, and no juror gave any indication of ethnic bias. The record shows the jury fully deliberated the case, asked the court questions during deliberations and returned a verdict in plaintiff's favor in one of the two causes of action. Again, we conclude the foregoing demonstrates the trial court did not act capriciously in placing reasonable limits on the scope of voir dire.

2. Closing Arguments

Plaintiff contends the trial court improperly overruled her counsel's objections to Amerifirst's closing arguments, and suggested to the jurors that counsel lodged improper objections. But plaintiff provides no record citations to the objections or the court's comments before the jury. Moreover, plaintiff does not identify the objections made or address their merits. Accordingly, plaintiff has not demonstrated error or prejudice.

G. *The Attorney Fee Order*

Because we reverse the court's judgment in favor of Amerifirst, we must also reverse the attorney fee award in Amerifirst's favor.

III

DISPOSITION

The judgment and the attorney fee order are reversed, and the trial court is instructed to enter a new judgment reflecting the jury's award in favor of plaintiff. Plaintiff is entitled to her costs of this appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.